

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
EXECUTIVE OFFICE OF THE MAYOR  
MAYOR'S OFFICE OF LEGAL COUNSEL  
Freedom of Information Act Appeal: 2015-84**

August 3, 2015

Mr. Lance Harvey

RE: FOIA Appeal 2015-84

Dear Mr. Harvey:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Metropolitan Police Department (“MPD”) improperly withheld records in response to your request for information under DC FOIA dated July 7, 2015.

Background

On July 7, 2015, you submitted a request to the MPD for records pertaining to an assault committed upon you on June 8, 2015, which was captured on video cameras outside of the Lincoln Theatre. Specifically, you requested:

1. Copies of all images- whether video or photographic, containing images of the assault and/or any of the suspects.
2. Copies of the video and audio and any notes taken of any and all interrogations of defendant "Juvenile RD", who was arrested on June 8, 2015 and later released.
3. Copies of any and all notes taken on the scene of the attack and arrest, including all notes related to the identities of the 4 suspects who were detained and placed into a lineup near the crime scene.
4. Copies of all communications and correspondence of any kind related to my case, including correspondence between the Police and the Attorney General's Office

In response, by email dated July 7, 2015, MPD denied your request based on an assertion that the records in question are investigatory files that are exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(3)(A) and (C)<sup>1</sup>.

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<sup>1</sup> In the same letter, MPD also disclaimed the ability to “admit or deny the request,” a so-called *Glomar* response, citing D.C. Official Code § 2-535(a)(2) and (a)(3)(C). This decision will not address the *Glomar* response or the corresponding privacy exemption analysis, however, because MPD appears to acknowledge the existence of the requested footage (i.e. “After due consideration, we must deny your request.”).

On appeal, you challenge the denial of your FOIA request on the following grounds: (1) the Office of the Attorney General (“OAG”) has refused to prosecute the only identified participant in the assault; (2) a string of similar assaults have occurred in the vicinity of the original assault perpetrated by men with similar description and release of the video would promote public safety; and (3) without the video footage you are unable to offer an award for the identification of the assailants or initiate a civil lawsuit against them.

The MPD responded to your appeal in a letter to this office reasserting its position that the release of any records in its possession responsive to your request would constitute a clearly unwarranted invasion of personal privacy and interfere with an ongoing MPD enforcement proceeding.

### Discussion

It is the public policy of the District of Columbia government that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2- 531. In aid of that policy, DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a). The right to examine public records is subject to various exemptions that may form the basis of a denial of a request. *Id.* at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

D.C. Official Code § 2-534(a)(3)(A)(i) exempts from disclosure investigatory records that are compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings. The purpose of the exemption is to prevent “the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding.” *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 124, 232 (1978). “[S]o long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence, [the investigatory record exemption] applies.” See *Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted). Conversely, when an agency fails to establish that the documents sought relate to any ongoing investigation or would jeopardize a future law enforcement proceeding, the investigatory records exemption does not protect the agency’s decision. *Id.*

In response to your appeal, MPD restated to this office that the criminal investigation pertaining to your assault is ongoing. We are obligated to accept this representation. That the OAG decided not to prosecute one of the assailants captured on the video does not preclude the OAG from prosecuting the other assailants captured on the film at any point before the statute of limitations on the crime expires. Releasing the footage now, in the midst of an ongoing investigation, risks the possibility of the wrongdoers fashioning defenses to prosecution or to witnesses being intimidated.

Similarly, the other documents you requested (notes by the investigatory officer and communications between MPD and OAG relating to the matter), are also exempt from disclosure under D.C. Official Code § 2-534(a)(3)(A)(i). MPD has represented that these records were compiled as part of an investigation into an ongoing proceeding and their release would interfere with that proceeding. We are obligated to accept these representations as well. Accordingly, the records are exempt from disclosure under D.C. Official Code § 2-534(a)(3)(A)(i).

Conclusion

Based on the foregoing, we affirm the MPD's decision and hereby dismiss your appeal. This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s/ Melissa C. Tucker

Associate Director  
Mayor's Office of Legal Counsel

cc: Ronald B. Harris, Deputy General Counsel, MPD (via email)